NO. 82-1138

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

VOLVO OF AMERICA CORPORATION, et al.,

Petitioners,

-vs-

CHARLENE P. ROSACK, individually and on behalf of others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MEMORANDUM IN OPPOSITION BY RESPONDENT CHARLENE P. ROSACK

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Respondent Charlene P. Rosack, plaintiff and class representative below, respectfully requests that Volvo's petition

for writ of certiorari be denied.

STATEMENT OF THE CASE

The petitioner's brief presents only one question upon which its request for certiorari is based:

> ". . . whether it is unconstitutional to certify a class without a named plaintiff who is representative or typical of the class and who lacks standing to pursue her individual claim."

(Pet. Brief at 3).

Volvo claims that the California Court of Appeal certified an antitrust class with a single plaintiff who is:

> "1. not typical of the class;
> 2. not representative of the class; and
> 3. not injured by the alleged antitrust violation."

(Pet. Brief at 2-3).

Petitioner Volvo is simply in error. The Constitutional question which it seeks to raise does not exist in this case. As will be demonstrated below, the Court of Appeal properly certified the class.

In so doing, the Court of Appeal specifically determined that:

(1) Common issues of law and fact, including the fact of injury or impact, predominate over individual issues;

(2) This class is manageable; and

(3) Plaintiff, Charlene P. Rosack, is a proper class representative.

It should be noted that the Court of Appeal's decision in this case was left undisturbed by the California Supreme Court, which denied Volvo's petition for hearing.[1/] Interestingly, the same issue of inadequate class representation raised in the instant petition was among those included in Defendant's Petition For Hearing to the California Supreme Court.

Specifically considered by the Court of Appeal was whether the named plaintiff

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1/ Defendant's Petition for Hearing, dated June 28, 1982, was denied by the California Supreme Court on August 25, 1982.

Rosack, was typical of the class she purports to represent. In its analysis of the relevant federal authorities on the subject, the Court of Appeal determined that she was:

> "Plaintiff alleges that she purchased a Volvo automobile at a point in time when the vehicle's price was controlled by the manufacturer and that she would represent a class of like purchasers. The fact that Volvos were being sold at that time at widely variant prices goes directly to the difficulty of plaintiff's task in proving the existence of a retail price-fixing scheme, but has no bearing on her ability to represent the class of purchasers." (Slip Op. at 29).

Furthermore, contrary to petitioners' present contentions, the Court of Appeal did not defer to a purported trial court finding that plaintiff was not typical of the class. (See Pet. Brief at 3,7). Rather, the Court of Appeal recognized but found unimportant the trial court's observation that plaintiff's purchase price was dissimilar from that of another

purchaser. In the Court's words:

> "we defer to the trial court's factual observation, but fail to see the import thereof." (emphasis added). (Slip. Op. at 29).

Thus, the Court of Appeal did not, as repeatedly contended by Volvo in its Petition, find that Charlene Rosack was not a proper class representative. To the contrary, it found that she is a proper class representative. This being so, petitioner's claimed "federal question" disappears. The petition should be denied.

PROCEDURAL HISTORY

The petitioners in this class action are Volvo of America Corporation and Aktiebolaget Volvo (sometimes referred to as "Volvo"). The Volvo entities manufacture and distribute Volvo-brand automobiles, parts and accessories.

Respondent, Charlene P. Rosack is a California resident and represents

a class of similarly situated persons who purchased in the State of California new automobiles manufactured and distributed by Volvo.

This action was filed on March 12, 1976, in the Superior Court of the County of San Mateo, California. The complaint alleges that plaintiff Rosack, and those similarly situated, purchased Volvo automobiles at prices artifically established above free competitive levels. The price-fix was alleged to violate California antitrust law, the Cartwright Act.

After a number of unsuccessful pre-trial motions by Volvo[2/], plaintiff

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2/ These included Volvo's removal to the U.S. District Court for the Northern District of California, followed by that Court's remand to state court. Volvo "appealed" that non-appealable remand order to the 9th Circuit and later to this Honorable Court. Volvo's petition in that regard was denied on March 7, 1977(#76-977). See also memorandum opinion by Mr. Justice Rehnquist dated Nov. 15, 1976 denying application for stay (No. A-395).

Rosack filed her Motion for Certification of Class on November 4, 1977. This motion, and the Volvo petitioners' many counter-motions, were argued in February, 1978. The trial court denied class certification, and on June 15, 1978, the class allegations were dismissed from the Complaint. An appeal followed; the Court of Appeal reversed the trial court's denial of class status. Volvo sought a hearing in the California Supreme Court but same was denied.

ARGUMENT

I

The Named Plaintiff's Claim is Typical of the Claims of the Class She Represents.

Petitioner contends that the California Court of Appeal has certified a class where the only named plaintiff is not a member of the class. (Pet. Brief at 11). Volvo claims that the Court of Appeal "deferred" to the trial court's specific factual find-

ing that plaintiff was not typical of other purchasers, since she purchased her automobile at a price above the "Monroney" sticker price. (Pet. Brief at 15).

This is not an accurate characterization of the record. The Court of Appeal acknowledged the lower court's factual observation as to the price plaintiff paid for her automobile, but found that observation unimportant.

In determining that plaintiff Rosack is a proper class representative, the Court of Appeal followed an unbroken line of federal decisions dealing with similar price-fixing allegations. In sum, those cases held that where the price of goods has been artificially inflated by a price fix, all purchasers of such goods suffer some economic injury. This injury occurs even in markets where price negotiation exists;

since any negotiated price is relative to the fixed "base" price, every negotiated price is likewise artificially higher as a result of the price fix. See, Presidio Golf Club v. National Linen Supply Corp. (N.D. Cal. 1976) 1976-2 Trade Cases ¶61, 221; In Re Sugar Industry Antitrust Litigation (E.D. Pa 1976) 73 F.R.D. 322, 344-45; P.D.Q. Inc. of Miami v. Nissan Motor Corp. (S.D. Fla. 1973) 61 F.R.D. 372.

In the Presidio Golf Club case, supra, defendants attempted to decertify the class, alleging that plaintiffs could not prove damage on a class wide basis since the linen business is characterized by widely variant pricing schemes based on different items, suppliers, and the supplier-customer relationship. (Id., at 70, 629).

In a well-reasoned opinion, the court followed federal authority which states

that the fact of injury can be established from proof of a price fixing conspiracy, and that the fact that individual class members may have paid different prices for the products does not foreclose class certification:

> "Plaintiffs allege that where proof of a conspiracy to fix prices exists, the fact finder is to 'presume'or infer impact - that liability and impact merge. Plaintiffs claim that proof of a conspiracy to fix prices satisfies the burden of proving liability, leaving for resolution only the issue of the amount of their recoverable damages. This Court is inclined to agree - that as a practical matter, to prove an effective conspiracy to fix prices, facts will be adduced which will tend to establish, perhaps circumstantially, that each class member was injured.
> (Id. at 70, 630, emphasis added).

The theory of the Presidio Golf Club case has been widely adopted. The Third Circuit, in Bogosian v. Gulf Oil Corp. 561 F.2d 434 (3rd Cir. 1977), wrote that class-wide damage can be

inferred from proof that a conspiracy affected prices:

> "If, in this case a nation-wide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide, the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage." Id. at 455 (emphasis supplied).

The same result was reached by the Northern District of California in the Western Sugar Industry Anti-trust Litigation, 1977 - 1 Trade Cases, paragraph 61, 373 (N.D. Cal.1976); by the Eastern District of Pennsylvania in the Eastern Sugar

Industry Anti-trust Litigation 73 F.R.D. (322 E.D. Pa. 1976); and by the United States District Court for the District of New Jersey in the City of Philadelphia v. American Oil Company, 53 F.R.D. 35 (D. N.J. 1971).

Similarly, in the Plywood litigation, In Re: Plywood Anti-trust Litigation (1976 - 1 Trade Cases, paragraph 60, 805 (E.D. Pa. 1970), manufacturers of plywood claimed in their opposition to class certification that questions of individual liability and fact of damage (negotiated purchases) precluded certification of that price fixing action. However, the class of purchasers was certified:

> "[I]f the members of each of the classes prove they purchased softwood plywood during the relevant period and that defendants conspiratorially increased or stabilized plywood prices, then the trier of fact may conclude that the requisite fact of injury occurred. There-

> fore, the fact of injury issues do not give rise to a host of individual questions which destroy the required predominance of questions common to the classes . . . Accordingly, we reject defendants' profferred argument that the prevalence of individually-negotiated transactions for the purchase and sale of plywood negates the requisite predominance of common questions under Rule 23(b)(3). Id. at 68, 484-85 (emphasis added).

The California Court of Appeal in its decision below, simply applied this and similar law to the facts before it. That Court found that factual deviation as to prices paid in singular transactions is irrelevant when the underlying claim of the class is based on an alleged price-fixing conspiracy. From this, the Court correctly concluded that the price paid by Charlene Rosack had no bearing on her ability adequately to represent the class, and that her claims were typical of the class she represents.

With no factual or legal support from the record, Volvo repeatedly maintains

that the class can consist only of those who purchased below the Monroney sticker price (Pet. Brief at 4). A recent federal decision has succinctly addressed this very issue. In Hedges Enterprises Inc. v. Continental Group (E.D. Pa. 1979) 81 F.R.D. 461, Judge Bechtle granted class certification where the class representative paid different prices for the same goods purchased by the class. The Court stated:

> "the mere fact that a representative plaintiff stands in a different factual posture is not sufficient to refuse certification . . . [t]he atypicality or conflict must be clear and must be such that the interests of the class are placed in significant jeopardy" (emphasis added) Id., at 466

Relying on the same authority as the California Court of Appeal, the Hedges court reasoned that where the named plaintiff's claims "arose out of the same general course of conduct by the

defendants and are based on the same or similar legal theories as those of the class," the requirements of Rule 23(a)(3) are satisfied. (Id., at 465.) The Hedges court cited from State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 567 (D. Minn. 1968) as follows:

> "Since the representative parties need prove a conspiracy, its effectuation, and damages therefrom -- precisely what the absentees must prove to recover - the representative claims can hardly be considered atypical."

Although petitioner does not, and cannot contend that the Court of Appeal misapplied the applicable federal authorities cited above, Volvo does maintain that Rosack's purchase above the sticker price, without negotiation, negates the existence of injury to her (Pet. Brief at 15).

At this juncture, it should be noted that the Monroney sticker states the base price of a factory - equipped model; the costs of any additional accessories

must be added to the sticker price. In fact, Charlene Rosack paid no more for her Volvo than the 'fixed' sticker price plus the 'fixed' price of the accessories she purchased.

Thus, the class representative, Rosack, has been damaged as much by the price-fix as anyone, and there is no reason to find her incapable of representing the class. This was the conclusion of the California courts.

The fact that others of the class may be "better negotiators" does not make Rosack unrepresentative. Such negotiators would work a "better" deal in both the price fixed and in the free markets. As the Court of Appeal recognized, all class members have been injured by the elevation of prices, regardless of their individual negotiating ability. Rosack's claim is therefore typical and representative of her fellow class members.

In City of Philadelphia v. American Oil Company, 53 F.R.D. 45 (D.N.J. 1971) in which several oil companies were charged with conspiring to fix the retail price of gasoline, the court found the named plaintiffs' claims typical despite the fact that different class members paid different prices for their gasoline. In this connection, the court stated as follows:

> "Because certain plaintiffs purchased in large quantities at substantially lower prices than others does not make their claims atypical. What is alleged here is an overall conspiracy affecting all prices. Thus, the proof needed to demonstrate this will be the same irrespective of whether one purchased in 500 gallon quantities or from retail service stations." (emphasis added) Id. at 68.

Thus, the Court of Appeal was entirely correct in finding Charlene Rosack a proper representative of the class. The Court's finding was a proper application of a consistent line of federal

authorities on the subject and should be left intact.

II

Petitioner Has Not Presented A Federal Question To This Court.

As the foregoing discussion and the record below clearly demonstrate, the California Court of Appeal properly found Charlene Rosack an adequate class representative. Therefore, petitioner's due process claims, found in arguments I through VI of the petition, possess neither factual nor legal justification.

Because Rosack is a proper class representative, this Court is not presented with the task petitioner wishes the Court to undertake. This Court need not decide the constitutionality of a "headless" class in this state-law antitrust context. (See Pet. Brief at 11, 13, 17, 21, 23) Nor is this Court presented with any class certification

issue which conflicts with this Court's holding in East Texas Motor Freight v. Rodriguez, (1977) 431 U.S. 395.

In Rodriguez, this Court explored the necessity of having adequate and representative named plaintiffs in an employment discrimination situation. In that case, this Court found the named plaintiffs to be inappropriate class representatives based, inter alia, on the following:

1. The named plaintiffs did not move for class certification;

2. The plaintiffs stipulated that they were not discriminated against when first hired;

3. The only issues addressed at the trial level were individual to these plaintiffs; and

4. Their claims conflicted with those of the union membership.

(Id. at 404, 405)

The Court specifically noted that

the named plaintiffs in Rodriguez did not suffer injury in common with the other class members.

The instant case presents a completely different situation. Here, as the Court of Appeal specifically found, Charlene Rosack has been injured by the alleged price-fix in the same way all other purchasers of Volvo automobiles during the relevant period. Thus, the Court of Appeal correctly determined that she is a proper class representative.

CONCLUSION

Volvo has not presented any federal or constitutional question to this Court. In the proceedings below, the California courts determined that this state-law antitrust action could properly proceed on a class action basis and that the named plaintiff, Charlene Rosack, is an appropriate class representative. Nothing in the decisions below conflicts with

with federal constitutional guarantees or even with federal case law on class issues.

Volvo's petition raises no questions meriting the attention of this Court. It is respectfully requested that the petition be denied.

Dated: February 3, 1983

Respectfully submitted,

COTCHETT, DYER & ILLSTON
CARTWRIGHT, SUCHERMAN,
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HAROLD C. WRIGHT

By SUSAN ILLSTON
SUSAN ILLSTON
ATTORNEYS FOR RESPONDENT
CHARLENE P. ROSACK

POS-1

PROOF OF SERVICE BY MAIL
PURSUANT TO 28 U.S.C.
and C.C.P. §§ 1013(a), 2015.5

I am a citizen of the United States; my business address is Bank of California Building, 4 West Fourth Avenue, Suite 500, San Mateo, California, 94402; I am employed in the County of San Mateo, where this mailing occurs; I am over the age of eighteen (18) years and not a party to the within cause. I served the within MEMORANDUM IN OPPOSITION BY RESPONDENT CHARLENE P. ROSACK TO PETITION FOR A WRIT OF CERTIORARI on the following persons on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in San Mateo, California, addressed as follows:

Paul, Hastings, Janofsky &
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I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on February 4, 1983, at San Mateo, California.

Mary T. Cesped

MARY T. CESPED